83-590

No. 83-

IN THE

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Supreme Court of the United States

October Term, 1983

DONALD BAXTER,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the application of Indiana law concerning the admissibility of results of polygraph examinations violate the due process rights of the Petitioner accorded by the Fourteenth Amendment to the United States Constitution?

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Respondent, State of Indiana, respectfully requests the Court to deny the issuance of a Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, refuse to review the decision entered by that court in Cause Number 1-882 A 248 on August 10, 1983.

OPINION BELOW

The Court of Appeals of Indiana entered an opinion in this cause on February 21, 1983. The opinion is set forth in Respondent's Appendix at A-1. The opinion was a

memorandum decision and, therefore, not officially reported. A Petition for Rehearing was timely filed and was denied by the Court of Appeals on April 11, 1983. The decision is set forth in Respondent's Appendix at A-5. Finally, a Petition for Transfer was timely filed and was denied by the Supreme Court of Indiana on August 10, 1983. The decision is set forth in Respondent's Appendix at A-7.

STATEMENT OF THE CASE

On November 11, 1981, the Petitioner, Donald Baxter, along with James R. Walker, deputy prosecuting attorney; and Gus Tabor, an attorney for the Petitioner; signed a stipulation and agreement which provided, among other things, that the Petitioner would submit to a polygraph examination administered by personnel of the Indiana State Police Department. Pursuant to the stipulation, the parties agreed that the Petitioner would waive his right to object at trial to the admissibility of the results of the examination. The polygraph examination was administered to the Petitioner by Charles E. Coffin, a qualified polygraph examiner employed by the Indiana State Police Department. At trial, Mr. Coffin testified that the Petitioner, during the examination, did not give truthful answers to the following questions posed to him:

1. Last October 29, did you force Nina to have sexual intercourse?
2. Last October 29, did you threaten to beat Nina?
3. Last October 29, did you really rape Nina?
4. Did you tell even one lie to your attorney?

However, prior to trial, on March 15, 1982, the Petitioner submitted to a second polygraph examination given by a private polygraph examiner. The examiner concluded that the Petitioner gave truthful answers in his denial that a forcible rape had occurred. Nevertheless, the trial court refused to admit into evidence the results of the second examination since the Petitioner and the State did not sign a written stipulation as required by law.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari must be denied since the Petitioner has failed to present a federal question with respect to his claim that he was denied due process of law by the exclusion, at trial, of the results of a second polygraph examination which had not been stipulated to by the parties as required by Indiana law.

The Petitioner, in his attempt to raise a federal question, merely controverts rights under the due process clause of the Fourteenth Amendment. The Petitioner has failed to meet the requirements of 28 U.S.C. §1257(3) since the amendment was never drawn into question in a manner directly bearing on the merits of the action. Also, since the Petitioner failed to raise a substantial federal claim in the state-court proceedings, the Supreme Court may not entertain the case. It is well settled that a federal challenge to a state law must be presented first to the state court.

Finally, since the judgment of the Court of Appeals of Indiana was based upon nonfederal grounds, the Supreme Court of Indiana did not vacate the judgment of the Court of Appeals, and the nonfederal grounds are adequate to support the judgment, the United States Supreme Court must decline to review the case.

ARGUMENT

THE PETITIONER HAS FAILED TO PRESENT A FEDERAL QUESTION WITH RESPECT TO HIS CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY THE EXCLUSION OF THE RESULTS OF A SECOND POLYGRAPH EXAMINATION WHICH HAD NOT BEEN STIPULATED TO BY THE PARTIES AS REQUIRED BY INDIANA LAW

The Petitioner contends that he was denied due process of law by the exclusion of the results of a second polygraph examination which had not been stipulated to by the

parties as required by Indiana law. Despite the Petitioner's contentions, the United States Supreme Court is without jurisdiction in the case since the alleged federal question was not ruled upon in the state-court proceeding.

Since this case comes to the United States Supreme Court from a state court, the relevant jurisdictional statute is 28 U.S.C. §1257. As applied to the circumstances of this case, that statute requires that in the state court the Petitioner have "specially set up or claimed under the Constitution...of...the United States" that right which he now seeks to have the United States Supreme Court enforce. 28 U.S.C. §1257(3). Similarly, Rules of the Supreme Court of the United States, Rule 21.1(h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

In an examination of both the Petition for Writ of Certiorari and the opinion of the Court of Appeals of Indiana, it is clear that the Petitioner failed to properly raise or preserve a federal claim. Nowhere in the opinions of the Supreme Court or Court of Appeals is any federal question mentioned, let alone decided or ruled upon. The United States Supreme Court has frequently stated when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary". *Street v. New York*, (1969) 394 U.S. 576, 582, 89 S.Ct. 1354, 1360. Thus, the United States Supreme Court must decline to review the case.

In addition, review by the Supreme Court is precluded since the Supreme Court and Court of Appeals of Indiana decided the issue exclusively by means of state law and never reached the alleged federal question. The Court of Appeals of Indiana, in addressing this issue, stated that as a

general rule, the results of polygraph examinations are not considered sufficiently reliable to be admissible in a criminal trial absent a waiver or stipulation by the parties. *Kimmel v. State*, (1981) ___ Ind. ___, 418 N.E.2d 1152, 1157, *cert. denied* 454 U.S. 932, 102 S.Ct. 430. Only if such stipulation is made does a trial court have the discretion to admit or to exclude such evidence. *Pavone v. State*, (1980) ___ Ind. ___, 402 N.E.2d 976, 979. In the case at bar, since there was no stipulation as to the admissibility of the second polygraph test, the trial court would have erred had it admitted the results of the examination in the absence of a stipulation.

In summation, the United States Supreme Court may not review the case as a result not only of the absence of a federal question, but also the decisions of the Supreme Court and Court of Appeals of Indiana rest on adequate and independent state grounds. *Herb v. Pitcairn*, (1945) 324 U.S. 117, 65 S.Ct. 459.

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

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IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

DONALD BAXTER	)	
	)	
Defendant-Appellant,	)	
	)	
-v-	)	No. 1-882 A 248
	)	
STATE OF INDIANA,	)	
	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable Hugh D. McQuillan, Judge
(Cause No. C-CR-81-91)

RATLIFF, J.

MEMORANDUM DECISION
STATEMENT OF THE CASE

Donald Baxter appeals from his jury conviction of rape, a class B felony. We affirm.

FACTS

Baxter was charged with one count of rape and two counts of criminal deviate conduct. He entered a plea of not guilty and requested a jury trial. The only issue at trial was consent. The jury returned a verdict of guilty as to the rape count but reached no verdict as to the two counts of criminal deviate conduct. He appeals from the conviction and judgment entered thereon.

ISSUES

1. Did the trial court err in refusing to admit an independent polygraph examination which contradicted an earlier polygraph examination whose admissibility Baxter had stipulated to?

2. Was the polygraph test question "Last October 29th, did you really rape Nina?" and its answer erroneously admitted?

DISCUSSION AND DECISION

Issue One

Baxter argues that Indiana should follow the New Mexico Supreme Court and abandon its requirement of stipulation as a precondition to admissibility of polygraph results because such requirement denies a defendant due process of law. We do not agree with Baxter that Indiana's stipulation rule with respect to the admissibility of polygraph tests denies defendant's right of cross examination or to present his own defense. In *Owens v. State*, (1978) 176 Ind. App. 1, 373 N.E.2d 913, this court

adopted the Arizona Supreme Court's requisites for the results of a polygraph to be admissible. Among those requirements is the opposing party's right to cross-examine the examiner, *Id.* at 915. Furthermore, we cannot accept Baxter's hypothesis that "the polygraph results excluded by the trial [c]ourt must be considered to be reliable and trustworthy since the trial [c]ourt admitted the results of the first polygraph examination." Appellant's brief at 13. The trial court's exclusion of the second examination did not prevent him from preparing his own defense. He was not required to stipulate to the first polygraph examination, and there is no evidence he did not do so knowingly or willingly.

As a general rule the results of polygraph examinations are not considered sufficiently reliable to be admissible in a criminal trial absent a waiver or stipulation by the parties. *Dean v. State*, (1982) Ind., 433 N.E.2d 1172, 1181, *suppl.* 441 N.E.2d 457; *Kimmel v. State*, (1981) Ind., 418 N.E.2d 1152, 1157, *cert. denied* U.S., 102 S. Ct. 430. Only if such stipulation is made does the trial court have the discretion to admit or exclude such evidence. *Dean; Pavone v. State*, (1980) Ind., 402 N.E.2d 976, 979. In this case there was no stipulation as to the admissibility of the second polygraph test as there was with the first. Had the court admitted such evidence in the absence of such stipulation it would have erred. *Owens.* The trial court did not err, therefore, in excluding the second polygraph examination in the absence of proper stipulation.

Issue Two

Citing no authority for his position, Baxter claims that it was error for the trial court to admit over this objection the question posed by the polygraph examiner, "Last October 29th, did you really rape Nina?" and its answer. The basis for his contention is that the answer given is a question of fact to be determined solely by the jury. The state points out that Indiana courts have held that where a valid waiver as to the results of a polygraph test exists, it is an "express

waiver of any and all objections to the use of the test results...." *Taylor v. State*, (1980) Ind. App., 409 N.E.2d 1246, 1250, *trans. denied.*

Judgment affirmed.

ROBERTSON, P.J. and NEAL, J., concur.

MEMORANDUM DECISION OF COURT OF APPEALS OF INDIANA ON PETITION FOR REHEARING

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IN THE

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FIRST DISTRICT

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Defendant-Appellant,	)	
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-v-	)	No. 1-882 A 248
	)	
STATE OF INDIANA,	)	
	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable Hugh D. McQuillan, Judge
(Cause No. C-Cr-81-91)

MEMORANDUM DECISION ON PETITION FOR REHEARING

Baxter argues that this court erroneously upheld the trial court's decision to refuse admission of his independently obtained polygraph test. This test contradicted the results of the polygraph test to which the parties had stipulated and which the court did admit into evidence. Baxter now contends that his independently obtained test results should have been admitted for the purpose of impeaching the earlier test.

We pass no judgment upon the merits of Baxter's argument, because it was not advanced in his original appellant's brief. As Judge Neal succinctly pointed out.

> "Ordinarily, the office of a petition for rehearing is to point out errors the court made in the original hearing. Normally, a question cannot be presented for the first time on a petition for rehearing, nor can a wholly different theory be advanced. *Cunningham v. Hiles*, (1980) Ind. App., 402 N.E.2d 17 (pet. reh.): 2 I.L.E. *Appeals* §446."

Ellsworth v. Homemakers Finance Service, (1982) Ind. App., 438 N.E.2d 6, 7. An appellant is not permitted to reopen an appeal and reorganize or elaborate his brief upon rehearing. *Jones v. City of Logansport*, (1982) Ind. App., 439 N.E.2d 666, 668.

This argument has been waived.

Petition for rehearing denied.

ROBERTSON, P.J. and **NEAL, J.**, concur.

NO. 1-882A248
DONALD BAXTER
V
STATE OF INDIANA

You are hereby notified that the Supreme Court has on this day denied Appellant's Petition to Transfer, without opinion. Givan, C.J. All Justices Concur

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 10th day of August, 1983.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals